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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/781,228	02/18/2004	Floyd Backes	160-011	2371

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EXAMINER

EWART, JAMES D

ART UNIT	PAPER NUMBER
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2683

DATE MAILED: 02/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/781,228

Applicant(s)

BACKES ET AL

Examiner

James D. Ewart

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on amendment filed on 1 February 2006.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-3 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

***Response to Arguments***

1. The applicant's arguments regarding prior art rejections under 35 U.S.C. 103(a), filed February 1, 2006, have been fully considered by the Examiner, but they are not deemed to be persuasive. Applicant argues that Soomro et al. doesn't teach that the channel selection, for communication devices, involves reducing radio frequency interference with the communication devices, Examiner disagrees. Soomro et al teaches a method of dynamic frequency selection and in 0005 states that ""implements dynamic frequency selection (DFS) to reduce interference" and in 0006 states that "interference with other primary licensed operators within a band must be detected and avoided in some regulatory domains". Soomero et al focuses on the movement to a new operating channel and the movement occurs to reduce interference as Soomero et al states in paragraph 0022: " ...a means to detect or infer the presence of other licensed operators within the current operating channel is required, together with the ability to selectively move to a new channel to avoid interference if such other licensed users are present. Moreover, movement to a new operating channel may be desirable for other reasons as well, such as, for instance, obtaining better channel conditions like signal-to-noise ratio"

2. Applicant further argues that the new limitation of "***prior to utilizing the selected channel for normal communications***", the selection of a radio frequency channel is communicated ***on the selected channel*** to other devices via a message ***indicative of an intent to utilize the selected channel***", Examiner disagrees. As shown in figure 3C of Soomro et al is step 320 all stations move to the new channel at the announced time and the next step 321 the owner station which is the access point (see 0029) sends out a beacon. The beacon is sent out

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prior to normal communications and occurs on the channel selected for communication and provides an indication of the intent to utilize the selected channel see figure 2 and 0029. Also see McFarland et al. U.S. Patent Publication 2004/0151137 0008 and Figure 4.

3. Regarding the double patenting, although amendments to the claims have been made, the same amendments were made to application 10/780,844. Other than the double patenting rejection, claims 2-3 are in condition for allowance.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-3 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3 of copending Application Nos. 10/780,844, 10/781,192, 10/781,309, 10/781,147 and 10/781,259. Although the conflicting claims are not identical, they are not patentably distinct from each other because either recite identical or substantially the same limitations with minor alterations such as method

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or computer program claims instead of the current apparatus claims. Although amendments to the claims have been made, the same amendments were made to application 10/780,844. Other than the double patenting rejection, claims 2-3 are in condition for allowance.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

***Claim Rejections - 35 USC § 102***

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

6. Claim 1 is rejected under 35 U.S.C. 102(e) as being anticipated by Soomro et al. (US Patent Publication no. 2003/0002456).

Referring to claim 1, Soomro et al teaches apparatus for use in a wireless network comprising: a device that is capable of automatically selecting one of a plurality of radio frequency channels for communication with other devices (Figure 5), wherein the selection of a radio frequency channel is performed such that radio frequency interference with other devices is reduced (0022); prior to utilizing the selected channel for normal communications the selection of a radio frequency channel is communicated on the selected channel to other devices via a message indicative of an intent to utilize the selected channel (0029).

***Conclusion***

7. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Andrus et al. U.S. Patent No. 6,993,334 discloses idle handoff with neighbor list channel replacement.

Klank U.S. Patent Publication No. 2004/0023629 discloses receiving unit for searching for at least one unused transmission channel in a communications device, and a method for use.

Kossi et al. U.S. Patent Publication No. 2002/0097696 discloses apparatus and associated method, for dynamically selecting frequency levels upon which to define communication channels in a radio communication system.

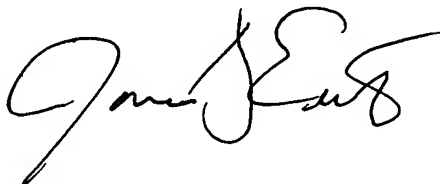
McFarland et al. U.S. Patent Publication No. 2004/0151137 discloses methods for implementing a dynamic frequency selection (DFS) feature for WLAN devices.

Mirchandani et al. U.S. Patent Publication No. 2004/0203828 discloses selecting channel assignment in a wireless data communication network.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to James D. Ewart whose telephone number is (571) 272-7864. The examiner can normally be reached on M-F 7am - 4pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, William Trost can be reached on (571)272-7872. The fax phone numbers for the organization where this application or proceeding is assigned are (571) 273-8300 for regular communications and (571) 273-8300 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571)272-2600.

A handwritten signature in black ink, appearing to read "James Ewart". The signature is fluid and cursive, with the first name "James" written in a larger, more prominent script than the last name "Ewart".

James Ewart  
February 14, 2006

A handwritten signature in black ink, appearing to read "William Trost". The signature is written in a cursive style, with the first name "William" and last name "Trost" clearly visible.

WILLIAM TROST  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 2600